

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT ODUM,

Defendant-Appellant.

UNPUBLISHED

November 13, 2003

No. 237032

Wayne Circuit Court

LC No. 00-006580

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to fifteen to thirty years in prison for the armed robbery conviction, and two years in prison for the felony-firearm conviction. We affirm.

On February 4, 1999, two men robbed Ned's Party Store in Detroit, Michigan. Nadeem Dlaiken, the owner of the party store, testified that he knew the first man, Maurice Clark, as a regular customer. According to Mr. Dlaiken, Clark put a gun to his head and proceeded to take his money. Mr. Dlaiken identified defendant during a photographic line-up as the second robber but was unable to identify defendant in the courtroom.

Wanda Cooke, a store clerk, claimed that she observed defendant walking back and forth by the cooler in the store before the robbery. She testified that defendant put her in a chokehold, pointed a gun to her head, and forced her to give him the money out of the cash register. Ms. Cooke identified defendant in a photographic line-up, and again during the subsequent trial.

I. Exculpatory Evidence

Defendant initially argues that his due process rights were violated when the prosecutor failed to provide him with exculpatory evidence. Specifically, defendant cites the prosecution's failure to give defense counsel the transcript of codefendant Clark's preliminary examination conducted in May 1999. Defendant claims that this information was exculpatory because one of the victims, Ms. Cooke, testified during the exam that the second robber (defendant) had a darker

complexion than Clark. To the extent defendant claims that his right to due process was violated by the prosecutor's failure to disclose exculpatory evidence, defendant presents a question of constitutional law that this Court reviews de novo.¹

"A criminal defendant has a due process right of access to certain information possessed by the prosecution."² To establish a *Brady* violation a defendant must prove:

(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.^[3]

Here, the record indicates that defense counsel was able, using reasonable diligence, to obtain the preliminary examination transcript prior to trial and utilize it during his cross-examination of Ms. Cooke. Defense counsel vigorously questioned Ms. Cooke about the testimony she gave at Clark's preliminary examination where she described the second robber as having a slim build and a darker complexion than Clark. And defendant not only had possession of the alleged "exculpatory" evidence, but was able to use it to challenge Ms. Cooke's identification of defendant. Indeed, the record shows that Ms. Cooke considered Clark to have a dark complexion, whereas, defendant was apparently lighter-skinned.⁴ We further note that defendant acknowledges that there is no evidence that the prosecutor made any attempt to suppress this evidence. Because defendant had access to the preliminary examination transcript and was able to use it during trial, we find no *Brady* violation in this case.

II. Identification Evidence

Defendant next asserts, in propria persona, that he was denied his constitutional right to due process when the trial court admitted the pretrial photographic identifications and in-court identification of defendant. According to defendant, these identifications were tainted by impermissibly suggestive pretrial procedures. We disagree. A trial court's decision to admit identification evidence is reviewed for clear error.⁵

"A photographic identification procedure violates a defendant's right to due process of law[□] when it is so impermissibly suggestive that it gives rise to a substantial likelihood of

¹ *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001).

² *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

³ *Lester*, *supra* at 281-282.

⁴ We note that Ms. Cooke explained during trial that her perception of defendant's skin tone during the robbery might have been affected by the fact that he had a full beard at the time and was wearing all black.

⁵ *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

misidentification.”⁶ An improper suggestion may arise when a witness is shown only one person or a group in which one person is singled out in some way.⁷ If such a procedure occurs, the trial court should not admit a subsequent in-court identification of the defendant by that witness absent a showing, on clear and convincing evidence, of an independent basis for the identification.⁸

A *Wade*⁹ hearing was held in this case to determine whether the photographic identification procedures were unduly suggestive. Mr. Dlaiken and Ms. Cooke were each involved in separate photographic show-ups conducted by the police. The trial court reviewed the photographs during the *Wade* hearing and concluded that defendant was afforded due process because the photo line-up involving Mr. Dlaiken was conducted fairly and was not unduly suggestive. A review of the record supports the trial court’s assessment.

According to the record, Mr. Dlaiken had no problem identifying defendant as the second robber during the photographic show-up. We further note that the show-up attorney present during the identification process made no objection to the photographic line-up procedure. Contrary to defendant’s assertion, the mere fact that Mr. Dlaiken was unable to identify defendant in court does not automatically indicate that his pretrial identification of defendant was somehow suggestive or improper. In fact, the record reveals that defendant’s physical appearance at trial was significantly different from his appearance in the photograph and from the way he looked in person shortly after the robbery. Because the photographic line-up presented to Mr. Dlaiken was not impermissibly suggestive, it was properly admitted at trial.

Although there was no testimony at the *Wade* hearing regarding Ms. Cooke’s photo identification process, she was questioned about her photo line-up during trial. Ms. Cooke testified that she was shown a photographic array at the police station on May 17, 1999, from which she was able to identify defendant as the second robber. While Ms. Cooke could not recall if anyone besides the detective was present during the show-up, the record fails to indicate that the procedures were so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.¹⁰

In any event, the record does reveal an independent basis for Ms. Cooke’s in-court identification of defendant. Some of the factors considered in making this determination include: (1) the witness’ opportunity to observe the offense; (2) the witness’ prior knowledge of the defendant; (3) the length between the crime and the confrontation; and (4) the witness’ degree of certainty at the prior identification.¹¹ Here, Ms. Cooke recalled that defendant had been

⁶ *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998) (footnote omitted).

⁷ *Id.*

⁸ *Id.* at 115.

⁹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

¹⁰ *Gray*, *supra* at 111.

¹¹ See *id.* at 115-116.

shopping at the party store for a few weeks prior to the robbery. She also testified that she observed defendant both before and during the robbery. In fact, she was able to identify defendant because of his eyes. Ms. Cooke never expressed doubt in her identification of defendant as the second robber. These factors support a finding that an independent basis existed for Ms. Cooke's in-court identification of defendant.

III. Jury Tampering

Defendant, in propria persona, further opines that his constitutional rights were violated because the jury was allowed to consider evidence not admitted at trial. In particular, defendant claims that the jury was given an inadmissible statement made by codefendant Clark to consider during their deliberations. In this statement, Clark allegedly implicated defendant in the robbery. Defendant claims that this statement was the reason the jury convicted him. We disagree. Because defendant failed to preserve this issue below, our review is limited to plain error affecting his substantial rights.¹²

A defendant has a right to a fair and impartial jury.¹³ The jury may only consider the evidence received in open court, and is prohibited from considering extraneous facts not introduced in evidence.¹⁴ To establish error requiring reversal, a defendant must show that the jury was exposed to extraneous influences and that these influences "created a real and substantial possibility that they could have affected the jury's verdict."¹⁵

Defendant attaches the affidavit of his brother, Terry Thompson, to his Standard 11 brief to support his argument. In his affidavit, Mr. Thompson avers that after the jury was discharged, a male juror informed him that the jury convicted defendant after being permitted to read Clark's statement in the jury room. Initially, we note that this affidavit is not included in the lower court record. Because this Court's review is limited to the lower court record, Mr. Thompson's affidavit will not be considered.¹⁶

Our Supreme Court in *Budzyn* refused to consider an unsigned affidavit of a juror, despite an affidavit from defense counsel averring that the juror had adopted all of the statements contained therein.¹⁷ The Court ruled that such testimony by an attorney concerning a juror's statements would amount to inadmissible hearsay.¹⁸ Although the instant case involves the affidavit of defendant's brother rather than his attorney, the finding articulated in *Budzyn, supra*, is nonetheless applicable in this case. Indeed, in this case we do not even have the name or

¹² *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

¹³ *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997).

¹⁴ *Id.*

¹⁵ *Id.* at 88-89.

¹⁶ *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992).

¹⁷ *Budzyn, supra* at 92, n 14.

¹⁸ *Id.*

affidavit of the juror in question. Absent admissible evidence to support his claims, defendant has failed to establish that the jury was exposed to extraneous influences.

IV. Ineffective Assistance of Counsel

Defendant ultimately argues, in propria persona, that his appellate counsel was ineffective because she failed to investigate and argue the issues raised in his Standard 11 brief. The standards applicable to a claim of ineffective assistance of trial counsel also apply to a claim of ineffective assistance of appellate counsel.¹⁹ In light of our disposition of the issues raised in defendant's Standard 11 brief, we find that defendant has failed to establish the requisite prejudice to prove a claim of ineffective assistance of counsel.²⁰

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper

¹⁹ See *People v Reed*, 449 Mich 375, 382; 535 NW2d 496 (1995).

²⁰ See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).